

In the United States Court of Appeals
for the Ninth Circuit

ALAN D. MACLEAN AND FRANCIS D. MACLEAN
APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

On Appeal From the Judgment of the United States
District Court for the Southern District of California

BRIEF FOR THE APPELLEE

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OPINION BELOW

The findings of fact, conclusions of law and judgment (R. 26-32) are not formally reported.

JURISDICTION

This appeal involves federal estate taxes. The amount in dispute, \$69,045.27 tax, plus \$8,630.66 interest for a total of \$77,675.93, was paid on August 15, 1957. (R. 15.) Claim for refund was filed on September 3, 1957 (R. 15, 29), and was rejected on March 15, 1958 (R. 15-16). Within the time pro-

vided in Section 3772 of the Internal Revenue Code of 1939, and on May 28, 1958, the taxpayers brought an action in the District Court for the recovery of the taxes and interest paid. (R. 3-11.) Jurisdiction was conferred on the District Court by 28 U.S.C., Section 1346. The judgment was entered on March 13, 1959. (R. 26-32.) Within sixty days and on March 19, 1959, a notice of appeal was filed. (R. 32.) Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

QUESTIONS PRESENTED

1. Whether the District Court properly found that the trust established by decedent on May 27, 1931, was a new trust and as such must be included in her gross estate as a transfer made subsequent to March 3, 1931.

2. Where a trust was revocable until 1941, whether the District Court properly found that the decedent did not make a "transfer" within the meaning of the Internal Revenue Code prior to March 4, 1931.

STATUTES INVOLVED

Internal Revenue Code of 1939:

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

(c) [as amended by Sec. 7(a), Act of October 25, 1949, c. 720, 63 Stat. 891] *Transfers in Contemplation of, or Taking Effect at, Death.*—

(1) [as amended by Sec. 207, Technical Changes Act of 1953, c. 512, 67 Stat. 615] *General rule.*—To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise—

* * * *

(B) under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (i) the possession or enjoyment of, or the right to the income from, the property, or (ii) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom;

* * *

* * * *

Subparagraph (B) shall not apply to a transfer made before March 4, 1931; nor shall subparagraph (B) apply to a transfer made after March 3, 1931, and before June 7, 1932, unless the property transferred would have been includible in the decedent's gross estate by reason of the amendatory language of the joint resolution of March 3, 1931 (46 Stat. 1516).

* * * *

(26 U.S.C. 1952 ed., Sec. 811.)

Joint Resolution of March 3, 1931, c. 454, 46 Stat. 1516:

Chap. 454.—Joint Resolution To amend section 302 of the Revenue Act of 1926.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the first sentence of subdivision (c) of section 302 of the Revenue Act of 1926 is amended to read as follows:

“(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money’s worth.”

STATEMENT

The findings of fact of the District Court (R. 27-29) were based upon the pleadings (R. 3-13), stipulations of facts and the exhibits attached thereto (R. 13-26). The facts are as follows:

This is an action for the refund of federal estate taxes brought by the appellants (hereafter taxpay-

ers) who are the executors of the estate of Elizabeth Beatrice Maclean, deceased. The decedent died testate on February 20, 1954. (R. 27.) The question involved in this case is the includibility in decedent's gross estate of a certain trust.

On January 12, 1923, the decedent as trustor created a trust (Ex. A, R. 16-20) wherein her husband, John Alexander Maclean, was named trustee. The entire net income of the trust estate, consisting of securities, was reserved to decedent for her life. In addition, decedent reserved the right to revoke the trust during the life of her husband with his consent. (R. 27-28.)

On May 27, 1931, by written document (Ex. B, R. 20-21), the decedent expressly revoked the above trust. This revocation was made in pursuance of, and in compliance with, the right of revocation contained in the trust indenture of January 12, 1923. Then on the same date, May 27, 1931, decedent created a new trust (Ex. C, R. 21-25) wherein she reserved to herself for her life the entire net income of the trust estate, consisting of securities transferred from the revoked trust. The new trust differed substantially in its terms from the revoked trust, and it constituted a separate, distinct and different trust from the revoked trust. It was not a continuation in modified form of the revoked trust. (R. 28.)

The new trust was revocable by the decedent, with the consent of her husband, until his death on February 19, 1941, at which time it became irrevocable. (R. 28-29.) The new trust was in existence at the

date of decedent's death on February 20, 1954. (R. 29.)

The taxpayers, as executors, filed an estate tax return showing no tax due and payable. Thereafter, the District Director of Internal Revenue at Los Angeles, California, assessed a deficiency, and the taxpayers paid the sum of \$77,675.93 for estate taxes and interest. (R. 29.) They filed an action for the refund of this sum plus interest, judgment was entered against them, and from such judgment they here appeal.

SUMMARY OF ARGUMENT

The only question in this case is whether decedent made a transfer of certain trust property before March 4, 1931, within the meaning of Section 811 (c) (1) (B) of the Internal Revenue Code of 1939. The two trust agreements differ in considerable respect. The 1923 trust provided that income was to go to decedent for life, upon her death the trust was to cease and all trust assets were to go to her husband. On the other hand, the trust indenture of May 27, 1931, not only named a new trustee but it also changed the beneficial interests in the trust. In the 1931 trust the decedent still retained the income for life, but thereafter the net income was to go to her husband for his life, the remainder to be held for the benefit of her two sons for life and upon their death was to be subject to their testamentary disposition, or lacking such distribution, to their surviving descendants per stirpes. Thus the two trusts

were completely different insofar as the remainder interests were concerned. The 1931 trust, which was still in existence at the time of decedent's death, was not the result of a transfer made before March 4, 1931. Through express revocation of the first instrument of 1923, decedent obtained once more complete and untrammelled dominion over the corpus; decedent used this dominion to direct the transfer of the trust corpus by her husband, trustee under the 1923 trust, to the Northern Trust Company, trustee under the new 1931 indenture, differing, as stated, in numerous respects. If the Court agrees with the Government's argument that the May 1931 indenture created a new trust, then, without more, the corpus of the trust is includible in the decedent's gross estate by reason of the amendatory language of the Joint Resolution of March 3, 1931, and Section 811(c)(1)(B), as amended, of the 1939 Code, since she retained the income of the property for life.

Additionally, it is clear from the decided cases and the legislative history surrounding the 1949 amendment to Section 811(c)(1)(B) which first provided that transfers made prior to March 4, 1931, were not includible in gross estate, that no transfer within the meaning of the statute took place in the instant case until the date on which the trust became irrevocable, February 19, 1941, the date of the death of decedent's husband. Hence, the corpus of the trust at the date of decedent's death was includible in her gross estate on a second ground, namely, as a transfer made on February 19, 1941, the date the trust became irrevocable.

ARGUMENT

I

**The Trust Established By Decedent On May 27, 1931,
Was A New Trust and As Such Must Be Included
In Decedent's Gross Estate As A Transfer Made
Subsequent To March 3, 1931**

It is the position of the Government that the corpus of the trust in question is includible in the gross estate of decedent under the provisions of Section 811(c) (1) (B) of the Internal Revenue Code of 1939, as amended, *supra*. That section provides for the inclusion in gross estate of all property of a decedent—

(B) under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (i) the possession or enjoyment of, or the right to the income from, the property, or (ii) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; * * *

There is no controversy about the fact that the retention of income for life by the decedent in the instant case fits within the above language. However, the section goes on to provide that—

Subparagraph (B) shall not apply to a transfer made before March 4, 1931; nor shall subparagraph (B) apply to a transfer made after March 3, 1931, and before June 7, 1932, unless the property transferred would have been includible in the decedent's gross estate by reason of

the amendatory language of the joint resolution of March 3, 1931 (46 Stat. 1516).

The facts in this case make it clear that a "transfer" within the meaning of Section 811(c) was made by decedent after March 3, 1931, on either of two grounds.

An examination of the two trust agreements shows that the second agreement, dated May 27, 1931, is not a mere continuation of the earlier agreement of January 12, 1923, but rather is a completely new trust. The 1923 agreement (Ex. A, R. 16-20) conveyed to the trustee, decedent's husband, John Alexander Maclean, various securities. The entire net income from the trust was to be paid to decedent during her life, with the trust to cease upon her death predeceasing her husband, all trust assets going to her husband. Should decedent outlive her husband, then the trust was to cease upon her death, the trust assets subject to her testamentary disposition, lacking such disposition, to her descendants then living, per stirpes. It is important to note that in the trust instrument decedent expressly reserved the right to revoke the trust during the life of her husband with his consent. (R. 18-19.) The trustee was given broad discretion in regard to the trust assets with full power to invest, sell and convey. His investments were not restricted to investments fixed by the state laws. (R. 17.)

Acting under her reserved right to revoke the 1923 trust agreement with the consent of her husband, decedent elected to do so on May 27, 1931, and on that date directed her husband as trustee "to trans-

fer all of the property now held under said trust to a new trust created by the undersigned Elizabeth Beatrice Maclean with The Northern Trust Company, Trustee". (Ex. B, R. 20-21.) This new trust, hereafter termed the 1931 trust, differed from the 1923 trust in several rather important particulars. The most significant change of all related to the disposition of the trust corpus after the death of decedent. The 1931 trust, as the 1923 trust, provided that net income was to go to decedent for life. Thereafter, while the 1923 trust provided for the dissolution of the trust with all trust assets to go to decedent's husband, the 1931 trust made the following disposition of the remainder interest: net income to decedent's husband for life, remainder to be held for the benefit of two sons for life, each portion thereupon to be subject to the sons' testamentary disposition or lacking such disposition to his surviving descendants per stirpes. (R. 22-23.) Thus the two trusts were different insofar as the remainder interests were concerned.¹ In directing her trustee to transfer the trust assets to the new trustee on May 27, 1931, and in executing the new trust indenture on that same date, the decedent made a transfer in which she retained for her life the right to income. It is obvious that such a transfer was not made before March 4, 1931, and that therefore the trust property is includible in decedent's gross estate under Section 811(c)(1)(B), as amended, of the 1939 Code and

¹ Also the new trust provided that sales made by the trustee were to be approved by decedent (R. 22), whereas the earlier trust contained no such requirement.

under the Joint Resolution of March 3, 1931, *supra*.

While the question of whether or not a new trust was formed is primarily a factual matter which must be determined by considering the trust instruments involved, it is interesting to note that the Supreme Court has considered a situation somewhat analogous to that at bar. In *Helvering v. Bullard*, 303 U.S. 297, the decedent transferred in 1927 certain securities by irrevocable deed to her son in trust, reserving the income to herself for life, with various remainder interests. In 1931 dissatisfaction with the administration of the trust impelled the decedent to seek its abrogation on the ground that it violated the rule against perpetuities. Eventually, a compromise agreement was entered into by the decedent and the adult beneficiaries, whereby a decree was entered in favor of the decedent in consideration of her execution of a new trust. This she did on February 17, 1932, once again reserving to herself a life interest. The decedent died in 1933, and it was the position of her representatives that the 1932 transfer had no independent existence and that in legal effect the trust in that year stemmed from the 1927 instrument. The Supreme Court held, however, to the contrary, and included the trust property in the decedent's gross estate as a transfer made after March 3, 1931. The Board of Tax Appeals likewise found to similar effect in *Webster v. Commissioner*, 38 B.T.A. 273, where a decedent created a trust in 1929 consisting of securities, reserving the income for her life. Pursuant to a power of revocation contained in the 1929 agreement, she

revoked the trust to the extent of fifty percent of the market value of the securities in 1932. On July 12, 1932, she created another trust using the withdrawn securities as the corpus. In *Webster*, as in *Bullard* and as in the case at bar, the taxpayer's argument was that the later trust was no more than a continuation of the pre-March 4, 1931, trust. In rejecting this argument, the Board of Tax Appeals stated (p. 280):

We think that this contention is not sound. The 1929 trust differed somewhat in its terms from the 1932 trust, as indicated by the respective paragraphs of the trusts quoted in the findings of fact. * * * When decedent withdrew securities from the 1929 trust they became her property to do with as she desired. The property withdrawn was conveyed to a new trust. Whatever remainder interest Baronig Baron had received in these securities under the 1929 trust when it was created was divested when decedent withdrew the securities from the 1929 trust. It is immaterial that Baronig Baron, the beneficiary of the 1929 trust, was made the beneficiary of the 1932 trust. He might not have been made the beneficiary and might not have received again a remainder interest in the securities that had been withdrawn from the 1929 trust. We hold that the 1932 trust was a new trust, created July 12, 1932. * * * Clearly, the 1932 trust, involving transfers made subsequent to March 3, 1931, comes within the provisions of [the Joint Resolution of 1932].

An even stronger case supporting the position that the 1931 trust was a new trust is present in the

case at bar where there was a change of beneficiaries in the later trust indenture.

When decedent expressly elected to revoke the 1923 trust, with her husband's consent, in accordance with the right specifically reserved in the 1923 indenture (R. 19), she plainly obtained full dominion over the trust corpus; it became her absolute property with complete power of disposition to do with it as she pleased and as if there never had been any 1923 trust at all. The instrument of revocation, executed in May, 1931, recognized this to be the situation for in it she expressly directed her husband as trustee under the 1923 trust to dispose of the property in the manner in which she chose, namely, "to transfer all of the property now held under said trust to a *new* trust created by the undersigned Elizabeth Beatrice Maclean with The Northern Trust Company, Trustee, of even date herewith" (*italics supplied*). (Ex. B, R. 20.) Thus, on the basis of these facts alone, the transfer from decedent involved in the creation of the May 1931 trust was made after March 3, 1931, and, therefore, the corpus of this new trust is properly includible in decedent's gross estate under the provisions of Section 811(c) (1) (B) of the 1939 Code and the amendatory language of the Joint Resolution.

But taxpayers' sole response to these record facts and the legal conclusions following from them is an assertion (Br. 6) that "The Government is in no position to contend on the record that May 27, 1931, is the correct answer to the question posed". The explanation afforded for this contention is (Br. 6) that "Appellants and Appellee have stipulated as a

fact this transfer was made by the trustee rather than the decedent. * * * Stipulation of Fact No. V, T R 15 eliminates the possibility that the decedent made the transfer on May 27, 1931. John Alexander Maclean made that transfer to the Northern Trust Company, Trustee * * *."

True, it is stipulated (R. 15) that—

The corpus of said Trust created January 12, 1923, was transferred by John Alexander Maclean, Trustee, to the Northern Trust Company, Trustee, on May 27, 1931.

But this fact must be read in the light of all of the instruments likewise stipulated, including the instrument of revocation of the 1923 trust. (R. 14-15, 20-21.) Thus, it is apparent that although physically the corpus of the 1923 trust was transferred by decedent's husband to the new trustee, this was done pursuant to the express direction contained in the instrument of revocation (R. 20) wherein she, with his approval, "hereby directs" him "as Trustee" under the 1923 trust to "transfer all of the property" held under the 1923 trust to "*a new trust created by the undersigned Elizabeth Beatrice Maclean with The Northern Trust Company, Trustee*" (italics supplied). The trustee-husband under the 1923 trust having legal title to the corpus conveyed that title to the new trustee, but this he did as a result of her express command; in so doing, he acted merely as her agent or instrument and the transfer and the creation of the new May 1931 trust was in every true sense made by decedent.

Furthermore, the written arguments in the District Court demonstrate that it is in this Court for the first time that taxpayers are asserting that the Government is in no position to contend on the record that May 27, 1931, was the date of the transfer. Indeed, the briefs submitted below establish that this issue was fully argued by both sides and, moreover, was considered and decided by the District Court. Thus, the District Court found that on May 27, 1931, decedent expressly revoked the 1923 trust, that by the indenture of May 27, 1931, decedent on that date created a new trust, that the new trust substantially differed in terms from the revoked trust and constituted a separate and distinct trust from the revoked trust, that the trust was not a continuation in modified form of the revoked trust. (R. 28.) Further, in its conclusions of law (R. 30), the District Court held that taxpayers had not sustained their burden of proving that the trust in existence at the date of the decedent's death was the result of a transfer made before March 4, 1931, that "The trust of May 27, 1931, constituted a new, separate, distinct, and different trust from the revoked trust of January 12, 1923", and "Said new trust was not a continuation in modified form of said revoked trust".

The Government's position was thus two-fold below and it is the same in this Court, namely, that the transfer occurred either on May 27, 1931, when the new trust was set up or on February 19, 1941, when the new trust became irrevocable by reason of

the death of decedent's husband. See point II, *infra*. Both contentions were plainly made and decided below; neither has been waived here or in the court below. No reason is presented why the Government should have waived the position fully sustained by the record that at the earliest the transfer occurred with the setting up of the new trust in May 1931. The conclusion follows that if either contention of the Government be sustained, the transfer is taxable, since the decedent reserved to herself for life the entire net income of the trust resulting from a transfer subsequent to March 3, 1931.

II

Since the Trust Was [✓]Re^covable Until 1941, the Decedent Did Not Make A "Transfer" Within the Meaning of the Code Prior To March 4, 1931

Additionally, it is our position that a conveyance in trust which is revocable is not a "transfer" within the meaning of Section 811(c)(1)(B) as amended by the Act of October 25, 1949 (Technical Changes Act of 1949) until such transfer becomes irrevocable. It should be noted that in the case at bar both the 1923 and the 1931 trust indentures provided that the trusts were revocable by decedent with the consent of her husband, John Alexander Maclean. It was not until decedent's husband died on February 19, 1941, that the 1931 trust became irrevocable. (R. 25, 28-29.) Therefore, not until that date was there a "transfer" within the meaning of Section 811(c). The Court of Claims, two judges dissenting, has held to this precise effect in a well-reasoned decision in

Smith v. United States, 139 F. Supp. 305. This decision, which gives careful attention to the history leading up to the various amendments, has come to the correct conclusion and we believe that the same result should obtain in the instant case. See also Rev. Rul. 277, 1953-2 Cum. Bull. 265.

Section 302(c) of the Revenue Act of 1926, c. 27, 44 Stat. 9, the predecessor of Section 811(c), originally required the inclusion in gross estate of property as to which the decedent had made a transfer "intended to take effect in possession or enjoyment at or after his death." In *May v. Heiner*, 281 U.S. 238, the Supreme Court held that property which the decedent had conveyed irrevocably, but in which he had retained a life interest, was not a transfer intended to take effect in possession or enjoyment at or after his death. One of the crucial points in the *May v. Heiner* holding was the finding of the Supreme Court that no interest in the corpus passed at the settlor's death because legal title had passed from the settlor *irrevocably* when the trust was executed. This decision, which the Supreme Court later stated upset "the century-old historic meaning and the long standing Treasury interpretation of the 'possession or enjoyment' clause" (*Commissioner v. Estate of Church*, 335 U.S. 632, 639), was quickly followed by that Court in three *per curiam* opinions.² Immediately thereafter the Joint Resolution of 1931 was enacted by Congress in order to correct the situation brought about by these decisions. The amend-

² *Burnet v. Northern Trust Co.*, 283 U.S. 782; *Morsman v. Burnet*, 283 U.S. 783; *McCormick v. Burnet*, 283 U.S. 784.

ment effected by the Joint Resolution made it clear that transfers with a retained life interest were to be included in gross estate. However, it is important to note that *May v. Heiner* concerned an irrevocable trust, and the Supreme Court, in an earlier case, *Reinecke v. Northern Trust Co.*, 278 U.S. 339, had held includible in gross estate a trust in which the grantor had reserved a life estate and, in addition, retained a power to revoke the transaction. Therefore, a trust such as that at bar, wherein decedent had a right to revoke the trust, would have been includible in gross estate both before and after the decision in *May v. Heiner*, if at the time of death the trust was still revocable. Thus the Joint Resolution was not aimed at including transfers with retained life estates where the transfer was revocable, since the Supreme Court in *Reinecke v. Northern Trust Co.*, *supra*, had already held such trusts includible within gross estate.

When Congress passed the Act of October 25, 1949 (Technical Changes Act of 1949), Section 7(b), which provided that transfers made before March 4, 1931, would not be included in gross estate, they made it clear that their intention was to honor the expectations of those who had arranged, or had refrained from rearranging their property affairs in reliance upon interpretations placed upon the earlier statutes by the Supreme Court in *May v. Heiner* and in *Hassett v. Welch*, 303 U.S. 303, 307, wherein that Court held that the Joint Resolution was not retroactive "in respect of past irrevocable transfers with reservation of a life interest." The necessity for the

1949 amendment arose out of the Supreme Court's overruling in that year of the *May v. Heiner* doctrine. In *Commissioner v. Estate of Church, supra*, the decedent executed an irrevocable trust in 1924, reserving to himself the income for life. The Court specifically overruled *May v. Heiner* and held (p. 639) that the retention of a life estate was a transfer "intended to take effect in * * * enjoyment at * * * his death" and without relying upon the amending language of the Joint Resolution of 1931 held the value of the corpus includible in the decedent's gross estate. Congress thereupon amended the section to exclude from gross estate those transfers made prior to the time of the Joint Resolution in 1931. Just what Congress intended to accomplish by this amendment is made plain in S. Rep. No. 831, 81st Cong., 1st Sess., pp. 7-8 (1949-2 Cum. Bull. 289, 293-294):

In the joint resolution of March 3, 1931, Congress created a new estate tax rule with respect to transfers after March 3. It left unchanged the rule in effect for transfers before that date. It is the opinion of your committee that the old rule should have been continued in effect with respect to such transfers until changed by legislation. Since the rule has been changed by the Supreme Court in the *Church* opinion, your committee believes that the Congress should act to restore the estate tax law to what it was prior to the *Church* opinion.

Some persons might have surrendered their life estates after 1931 had they not relied on the interpretation of the estate tax law which has now been overruled and in some cases con-

siderable hardship may result from application of the new interpretation presented in the Church case. It is the opinion of your committee that after all of these years these persons are entitled to rely upon the long standing interpretation in *May v. Heiner*, and the proposed amendment is accordingly intended to assure that result.

Thus, as the Court of Claims stated in *Smith v. United States*, *supra*, p. 309, from the above-quoted language it is obvious that Congress meant to restore to pre-1931 transactions the tax status which they had from the time of the decision in *May v. Heiner* in 1930 to that of the decision in *Estate of Church* in 1949. And it is also clear that by the amendment Congress did not intend to exempt from taxation property which had never before been exempt under *May v. Heiner*. In the present case, because of decedent's retention of the power of revocation, the trust corpus would have been included in her gross estate both before and after *May v. Heiner*. The 1949 amendment, excluding transfers made prior to March 4, 1931, obviously then did not intend to cover decedent's situation. She could not have properly relied upon the *May v. Heiner* case in view of the earlier case of *Reinecke v. Northern Trust Co.*, *supra*, wherein it was made quite clear that the retention of a life estate along with the power of revocation in the trustor would suffice to include the trust in gross estate. In the case at bar it was not until 1941, when decedent's husband died, that she finally had a trust situation which would fall within the cover-

ing language of *May v. Heiner*. And, we submit, it was not until that date, 1941, that decedent accomplished the type of transfer contemplated by Congress in the 1949 amendment. *Smith v. United States, supra*. But 1941 is too late, and transfers made then are clearly includible in gross estate.

In support of our interpretation of the word "transfer", which we submit is the only interpretation which can give effect to the legislative intent behind the 1949 amendment, we refer to the decision of the Supreme Court in *Reinecke v. Northern Trust Co., supra*. In that case one of the contentions made was that since the trusts in question were created long before the passage of any statute imposing an estate tax, the taxing statute if applied to them was unconstitutional and void because retroactive. In reaching this point, the Supreme Court stated (p. 345) :

But in *Chase National Bank v. United States*, decided this day, *ante*, p. 327, the decision is rested on the ground, earlier suggested with respect to the Fourteenth Amendment in *Saltonstall v. Saltonstall*, 276 U.S. 260, 271, that a transfer made subject to a power of revocation in the transferor, terminable at his death, is not complete until his death. Hence § 402, as applied to the present transfers, is not retroactive, since his death followed the passage of the statute.

Likewise, in *Estate of Sanford v. Commissioner*, 308 U.S. 39, the Court was concerned with the statute imposing a tax upon the transfer of property by gift.

There, too, the conveyance in question was made before the enactment of the statute, but it contained a power of revocation which was not relinquished until after the enactment date. The Court held that the "transfer" contemplated by the statute occurred, not when the title passed, but when the title became irrevocable. To like effect was the earlier decision in *Burnet v. Guggenheim*, 288 U.S. 280. And so too, in the case at bar. The transfer did not take place when the title passed, but rather when the passage of title became irrevocable. Thus the transfer here did not take place until February 19, 1941.

Taxpayer places much reliance on and quotes at length from the Tax Court decision in *Estate of Cuddihy v. Commissioner*, 32 T.C. No. 110. In the *Cuddihy* case, which the Tax Court found factually distinguishable from *Smith*, the decedent had a right to terminate the trust with the consent of at least four of his seven children, and then the termination was only in favor of decedent's children. There was no way by which decedent could recover the property. This is, of course, completely different from the instant case where decedent had the right to revoke the trust for her own benefit, and needed only the consent of her husband (whose possible adversity of interest could in any event be no more than that of a second life tenant).

The corpus of a trust in which a life interest is retained which is not transferred until February 19, 1941, as in the case at bar, is clearly includible within the gross income of decedent under Section 811

(c) (1) (B) of the 1939 Code, and the District Court correctly so held.

CONCLUSION

The holding of the District Court that the trust corpus was includible in decedent's gross estate is correct on either of the two grounds stated above and should be affirmed.

Respectfully submitted,

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